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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, MARCH 1, 2002

APPLICATIONS OF

ONE CALL CONCEPTS, INC.

CASE NO. PUE020072

For Certification Status and to
Revoke Certification Status

ORDER DISMISSING APPLICATIONS

On December 10, 2001, One Call Concepts, Inc. (“OCC”) filed an Application for Certification Status and an Application to Revoke Certification Status (collectively, “Applications”). OCC requests that the Commission: (1) grant certification status to OCC as the one-call notification center provider for the geographical area covering the entire Commonwealth; and (2) revoke the certification status of the existing one-call notification center providers within the Commonwealth.

On December 21, 2001, Virginia Underground Utility Protection Service, Inc. (“VUUPS”) and Northern Virginia Utility Protection Service, Inc. (“NVUPS”) jointly filed a Motion to Dismiss Applications (“Motion”). On January 22, 2002, OCC filed an Opposition to Motion to Dismiss Applications (“Opposition”). On February 1, 2002, VUUPS and NVUPS jointly filed a Response to Opposition to Motion to Dismiss Applications (“Response”).

The Applications proffer several facts, including the following. OCC currently provides services as a notification center for the area north of the Rappahannock River (the “Northern Territory”) pursuant to a Master Service Agreement with NVUPS. NVUPS currently holds Certificate NC-3 to operate a one-call notification center in the Northern Territory. VUUPS currently holds Certificate

NC-1 to operate a one-call notification center in the area south of the Rappahannock River, and performs such functions through an independent vendor. The Applications request the Commission to revoke these two certificates and to grant OCC a single certificate for the entire Commonwealth.

The Applications further state that NVUPS and VUUPS do not qualify for certification as a notification center under Va. Code Ann. § 56-265.16:1. The Applications assert that NVUPS and VUUPS are not experienced, responsible vendors and are not sufficiently independent. Conversely, the Applications state that OCC is a qualified, responsible vendor with a proven record of service. In addition to Virginia, OCC provides one-call services in 13 states, the District of Columbia, and the Canadian provinces of Alberta and Ontario. The combined annual volume for these territories exceeds four million inbound locate requests and 17 million outbound notifications.

The Motion by VUUPS and NVUPS states that the Commission has promulgated rules (20 VAC 5-300-90) necessary to implement the Commission's authority to enforce the Underground Utility Damage Prevention Act (Title 56, Chapter 10.3 of the Code of Virginia) ("Act"). The Motion asserts that 20 VAC 5-300-90 I ("Rule I") requires an application for a certificate to be supported by the operators of the underground facilities responsible for more than half of the ticket volume applicable to Virginia of the existing notification center during the most recent 12 months preceding the application for which data is available. The Motion claims that the Applications are void of any assertion that OCC is prepared to prove that it satisfies this requirement. The Motion also contends that revocation of the existing certificates would be pointless unless a successor certificate or certificates are issued.

OCC's Opposition includes the following positions, *seriatim*. The issue that OCC has placed before the Commission is whether the Commission should permit NVUPS and VUUPS to hold certificates to operate notification centers when NVUPS and VUUPS, themselves, do not possess the

necessary qualifications, ability, resources, know-how or experience to provide the services of a notification center successfully and efficiently as required by the Act. NVUPS and VUUPS possess conflicts of interest when they act as both the overseers of the operation of a notification center as well as the provider of notification center services under their certification. NVUPS' and VUUPS' procedural objection, that the Application for Certification is not supported by the operators of the underground facilities responsible for more than half of the ticket volume, only has merit if the Commission places form over substance. In pending Case No. PUE010422, Staff recommends that the Commission delete the rule relied upon in the Motion (*i.e.*, Rule I). The Commission also should deny the Motion due to the fact that the position of the operators regarding a favored vendor for notification centers currently is in a state of flux.

Continuing, OCC states that it will solicit support of operators pursuant to Rule I if the Commission deems it necessary. OCC proposes to exclude NVUPS and VUUPS from the operators' choice of vendors in soliciting such support, but notes that NVUPS and VUUPS likely will oppose such procedure. OCC concludes that such solicitation at this time, and without guidance of the Commission, is futile and meaningless. OCC states that the Commission has great discretion in administering the Act, that blind adherence to written rules is not desirable, that strict adherence to Rule I at the time of filing will defeat the intention of the Act, and that where compliance with a rule is impossible or futile, the Commission may proceed without such compliance. In the alternative, OCC maintains that, if the Commission chooses not to exercise its discretion to consider OCC's certification request, then the Commission should still revoke the current certificates for good cause shown, and this may result in an extended "lame duck" period. OCC believes that the Commission's guidance is needed in order to address these issues.

In their Response, NVUPS and VUUPS assert that OCC admits it has not complied with Rule I and that, as a result, the Applications must be dismissed. The Response also states that OCC's argument that the Commission should ignore its rules is untenable and contrary to *Va. Comm. for Fair Utility Rates v. VEPCO*, 243 Va. 320, 327 (1992), where the Supreme Court of Virginia explained that the Commission must follow its rules until changed in a manner permitted by Virginia Constitution and statutes. The Response contends that much of the argument in OCC's Opposition may be appropriate in the pending rulemaking case, Case No. PUE010422, but is irrelevant to whether the Applications comply with the Commission's rules.

NOW THE COMMISSION, upon consideration of the Applications, the Motion, the Opposition, the Response, and the applicable statutes and rules finds that the Applications should be dismissed without prejudice.

The Commission's currently effective *Rules governing certification of notification centers* include the following requirement (20 VAC 5-300-90 I (emphasis added)):

I. An application for a certificate may be submitted for any geographic area (i) for which a certificate has been previously granted by the Commission, or (ii) in which a notification center exempt from the requirements of §56-265.16:1 of the Code of Virginia is currently operating, *if such application is supported by the operators of the underground facilities responsible for more than half of the ticket volume applicable to Virginia of the existing notification center during the most recent 12-month period preceding the filing of the application for which data is available.* If the Commission determines that a certificate should be granted to the applicant hereunder, the certificate previously issued for the same geographic area shall terminate as of the effective date of the new certificate.

OCC acknowledges that it has not complied with this rule. OCC currently is not able to establish that its application for certification is supported by the operators of underground facilities responsible for

more than half of the ticket volume applicable to Virginia of the existing notification center during the most recent 12-month period preceding the filing of the application for which data is available.

We cannot accept OCC's assertion that compliance with Rule I places "form over substance." Rather, this Commission must follow its duly adopted rules unless or until changed in a manner permitted by the statutes and Constitution of Virginia.¹ Based on the Applications, we also are not persuaded that compliance with Rule I is impossible or futile such as to warrant noncompliance. In addition, OCC has not established that strict adherence to Rule I at the time of filing defeats the intention of the Act.

We also reject OCC's invitation to revoke the existing certificates and to implement a "lame duck" period. Based on the Applications, we do not find that revoking the existing certificates, without issuing a successor certificate or certificates, is in the public interest or will further the purpose of preventing or mitigating loss of, or damage to, life, health, property or essential public services resulting from damage to underground utility lines.²

Finally, we respond to OCC's plea for guidance. In Case No. PUE010422, the Commission has initiated an investigation into the appropriate policies and rules governing the certification of notification centers and maintenance of acceptable levels of performance. As noted by OCC in its Opposition, the continued appropriateness of Rule I is one of the issues raised in that pending proceeding. Accordingly, whether Rule I should be eliminated is properly before the Commission in Case No. PUE010422. The Commission's existing rules, however, remain in effect until superseded by any new rules that may result from Case No. PUE010422. OCC is not precluded from resubmitting its

¹ *Va. Comm. for Fair Utility Rates v. VEPCO*, 243 Va. 320, 327 (1992).

² *See, e.g.*, Va. Code Ann. § 56-265.16:1 D.

applications, and OCC is not required to wait until any new rules are promulgated. Any application, however, must be in conformance with the Commission's rules in effect at the time of such filing.

Accordingly, IT IS ORDERED THAT:

(1) OCC's Application for Certification Status and Application to Revoke Certification Status are hereby dismissed without prejudice.

(2) There being nothing further to come before the Commission in this case, this matter is dismissed.